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GANDING MAJU SDN BHD

v.

KS PROPERTY DEVELOPMENT SDN BHD; AFFIN - ACF FINANCE BHD (INTERVENER)

B

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI J
[ORIGINATING SUMMONS NO: 24-859-2003]
27 NOVEMBER 2007

C

LAND LAW: *Caveat - Removal of - Application for - Whether plaintiff aggrieved by existence of caveat - National Land Code, s. 327(1) - Whether there was termination of joint venture agreement between plaintiff and defendant - Whether entry of caveat by defendant unmeritorious and misconceived - Whether defendant had no caveatable interest - Whether there were serious questions to be tried*

D

This was an application by the plaintiff for the removal of a private caveat on 254 pieces of land of which the plaintiff was the registered owner. On 2 November 1999, the plaintiff and the defendant entered into a joint venture agreement to develop the land owned by the plaintiff into a housing scheme comprising of 271 units of medium costs houses. However, the defendant had failed to comply with various articles of the agreement which were salient features of the agreement. Despite various reminders and extension of time given to the defendant to fulfill its obligation under certain articles of the joint venture agreement, the defendant still failed, thus prompting the plaintiff to issue a notice of termination of the said joint venture agreement. The notice of termination dated 26 June 2002 was sent to the defendant. Following this termination, the defendant had on 24 October 2002 lodged a private caveat on the said 254 pieces of land. It was the contention of the plaintiff that as the caveat was lodged by the defendant after the termination of the joint venture agreement, the defendant had no caveatable interest in the said land and thus the private caveat ought to be removed. The defendant in resisting the plaintiff's application argued that the plaintiff lacked capacity in entering into the said joint venture agreement because there was an earlier joint venture agreement between the plaintiff and a third party and that a dispute arising therefrom was pending hearing at the Ipoh High Court. The defendant further pleaded that it had tried its best to perform its obligations under the joint venture agreement although a bit late and had been requesting for time

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from the plaintiff. In the defendant's view, the private caveat ought to remain and the *status quo* be maintained until the disposal of the suit between the plaintiff and the third party. A

Held (granting plaintiff's application for removal of caveat):

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(1) The plaintiff was indeed aggrieved by the existence of the caveat on his land. He is the registered proprietor of the land. He had an unfettered right to deal with the land as he pleaded. By its very existence, the caveat hindered and restricted the right of the plaintiff to deal with his property. That was sufficient to bring the plaintiff within the scope of s. 327(1) of the National Land Code. (para 6) C

(2) The application for the entry of the said caveat was made on 24 October 2002 which was almost four months after the notice of termination of the said joint venture agreement. The notice of termination was dated 26 June 2002. This was sent to the defendant after repeated reminders were issued by the plaintiff regarding the defendant's default of various articles in the said joint venture agreement which the defendant was relying on in Form 19B. The defendant openly admitted that it had failed to obtain the necessary financing timeously as stipulated in the joint venture agreement and that extension of time was given by the plaintiff. Subsequent conduct of the defendant in response to the notice of termination of the joint venture agreement further amplified the fact that there was a termination of the said agreement. (para 11) D E F

(3) With the termination of the joint venture agreement there was therefore nothing at all on which the defendant could possibly claim to have any interest in the land, let alone caveatable interest. Thus, the defendant's application for the entry of the caveat after the termination of the joint venture agreement was certainly unmeritorious and misconceived. Further, the defendant had made a frontal attack on the legality of the joint venture agreement itself. There was no relevance of the suit between the plaintiff and Syarikat Sri Manja Sdn Bhd as affecting the plaintiff's capacity to enter into the joint venture agreement with the defendant. (paras 11 & 12) G H

(4) The defendant had no caveatable interest in the land other than the right given by article 9 of the joint venture agreement. The said article 9 entitled the defendant to lodge a private caveat against the said land upon the execution of I

A the joint venture agreement. The said provision could not give rise to an interest in land as envisaged by the provisions of the National Land Code for an entry of a caveat. (para 12)

(5) The defendant had failed to disclose any serious question to B be tried. The defendant had not filed any action whatsoever against the plaintiff in respect of the dispute between them. This failure on the defendant's part strongly weighed against their plea for the continuance of the caveat to remain on the plaintiff's land. The issue of maintaining *status quo* and balance C of convenience therefore did not arise in the circumstances. (para 13)

Case(s) referred to:
Ex parte Sidebotham [1880] 14 Ch D 458 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ D *520 CA* ***(refd)***
Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 1 CLJ 545 CA ***(refd)***
Nanyang Development (1966) Sdn Bhd v. How Swee Poh [1969] 1 LNS 116 FC ***(refd)***
E *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA* ***(refd)***
Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn Bhd & Anor & Another Appeal [2003] 3 CLJ 339 CA ***(refd)***
Toko Palayakat Jamal (M) Sdn Bhd v. Soon Seng Company Sdn Bhd F *[2004] 3 CLJ 32 CA* ***(refd)***
Wong Kuan Tan v. Gambut Development Sdn Bhd [1984] 2 CLJ 26; [1984] 1 CLJ (Rep) 441 FC ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(refd)***

G **Legislation referred to:**
National Land Code, s. 327(1)

For the plaintiff - HK Teh; M/s HK Teh & Assoc
For the defendant - Julian Leon; M/s Leon & Lim
For the intervener - Suwinder Singh; M/s Loh Poh Seng & Co
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Reported by Suhainah Wahiduddin

JUDGMENT

I **Balia Yusof Wahi J:**

[1] This is an application by the plaintiff for the removal of a private caveat on 254 pieces of land held under H.S.(D)KA9043 to H.S.(D)FA 9296, PT Nos: 73940 to 74193 in the Mukim of

Ulu Kinta Negeri Perak Darul Ridzuan. The plaintiff is the registered owner of all these 254 pieces of land. The pencelah has by an earlier court order been made a party as an intervenor in respect of its interest in the subject matter and involvement with the parties herein. The pencelah is the chargee in respect of 251 pieces of the land in this proceeding.

The Facts

[2] On 2 November 1999, the plaintiff and the defendant entered into a joint venture agreement to develop the land owned by the plaintiff into a housing scheme comprising of 271 units of medium cost houses. The said joint venture agreement contains the following salient features, namely:

(i) Article 3: the defendant to pay to the plaintiff a deposit of RM150,000 upon execution of the joint venture agreement.

(ii) Article 4: the defendant to grant to the plaintiff Special Advances on various dates pending the commencement of development of the said lands as follows:

(a) cash sum of RM350,000 by 15 November 1999 or alternatively the transfer of two units of residential houses in Kuala Kangsar equivalent in value to RM350,000 by 15 November 1999 (Article 4.1.1);

(b) further cash sum of RM450,000 by 15 November 1999 or alternatively the transfer of 2 units of shop-houses in Taiping equivalent in value to RM450,000 with Certificates of Fitness to be issued by 30 April 2000 (Article 4.1.2); and

(c) further cash sum of RM150,000 by 10 December 1999 (Article 4.1.3);

(iii) Article 5: the Deposit and Special Advances are to be deducted from the plaintiff's share of units of houses or gross proceeds from the plaintiff's units of houses arising from the development thereof.

(iv) Article 8: the defendant shall settle the redemption sum and other monies due to the pencelah to secure the discharge of charge in respect of the said lands charged to the pencelah. The redemption sum shall be paid by the defendant to the

A pencelah upon the receipt by the defendant of the letter of offer from a financial institution approving the bridging loan facilities to finance the development of the said lands.

(v) Article 11.1: the defendant shall procure the bridging loan
B within six months from the date of the joint venture agreement (ie six months from 2 November 1999).

(vi) Article 12: the defendant has also covenanted to pay the following:

C (a) to pay the arrears of quit rent amounting to RM90,000 by 25 December 1999;

(b) to pay all quit rents assessment rates and other outgoings in respect of the said land;

D (c) pay all premiums, survey fees and other charges in connection with the upgrading of low-cost houses to medium-cost houses and the surrender of 68 existing titles for the re-issuance of 85 new titles;

E (d) to pay all development charges and contributions to ISF, DID, Tenaga Nasional Berhad, Waterworks and Telekom in respect of the development of the said lands.

(vii) In consideration of all the abovesaid payments to be made by
F the defendant to the plaintiff and the relevant authorities, the parties have jointly agreed to share the 271 units of buildings to be developed upon the said lands as follows:

(a) the plaintiff as landowner becomes entitled to 4 units of
G completed 2 storey shophouses, 36 units of residential houses and 2 parcels of vacant lands (refer art. 7); and

(b) the defendant as developer becomes entitled to all other buildings and lands arising from the development of the said lands.

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[3] The agreement between the plaintiff and the defendant did not work well. As early as 13 April 2000, after a period of only five months the plaintiff has started sending reminders to the defendant in respect of the defendant's default of article 4 of the
I joint venture agreement pertaining to the special advances payable to the plaintiff. It is evident that in the series of letters exhibited by the plaintiff in its affidavit in support of this application, the

defendant has failed to comply with various articles of the agreement which has been earlier referred to as the salient features of the agreement. Despite various reminders and extension of time given to the defendant to fulfill its obligation under articles 8 and 12 of the joint venture agreement, the defendant still fails and thus prompting the plaintiff to issue a notice of termination of the said joint venture agreement. The notice of termination dated 26 June 2002 was sent to the defendant by the plaintiff's solicitors Messrs H.K. Teh & Associates. Following this termination, the defendant had on 24 October 2002 lodged a private caveat on the said 254 pieces of land. It is the contention of the plaintiff that as the caveat was lodged by the defendant after the termination of the joint venture agreement, the defendant has no caveatable interest in the said land and thus the private caveat ought to be removed.

[4] The defendant in resisting the plaintiff's application argues that the plaintiff lacks capacity in entering into the said joint venture agreement because there is an earlier joint venture agreement between the plaintiff and a third party and that a dispute arising therefrom is pending hearing at the Ipoh High Court. The defendant claims that had it known of this fact, the joint venture agreement would not have been signed and thus accused the plaintiff of being guilty of fraud and misrepresentation. The defendant further pleads that it has tried its best to perform its obligations under the joint venture agreement although a bit late and has been requesting for time from the plaintiff. In the defendant's view the private caveat ought to remain and the *status quo* be maintained until the disposal of the suit between the plaintiff and the third party.

The Law

[5] To bring an action for the removal of a caveat, it is incumbent upon the plaintiff to show at the outset that it falls within the category of an aggrieved person under s. 327(1) of the National Land Code. Although the term "aggrieved person" is never defined in the National Land Code, there are ample authorities which may be referred to in our quest for such definition. For instance, in *Ex parte Sidebotham* [1880] 14 Ch D 458, 'a person aggrieved' was taken to mean a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something or wrongfully affected his title

A to something. In our own Court of Appeal, in the case of *Wu Shu Chen & Anor v. Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854, at p. 868 it was ruled:

> ... the word "aggrieved" must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

[6] From the evidence available, I have no hesitation in holding that the plaintiff is indeed aggrieved by the existence of the caveat on his land. He is the registered proprietor of the land. He has an unfettered right to deal with the land as he pleases. By its very existence, the caveat hinders and restricts the right of the plaintiff to deal with his property. That is sufficient to bring the plaintiff within the scope of s. 327(1) of the National Land Code.

[7] It is trite that for the defendant to succeed in maintaining the private caveat he has only to show that it has a caveatable interest. The onus is on the defendant. Hashim Yeop Sani FJ in *Wong Kuan Tan v. Gambut Development Sdn. Bhd* [1984] 2 CLJ 26; ([1984] 1 CLJ (Rep) 441) in explaining the nature of the onus said (at pp. 443-444):

> The nature of the onus which lies upon a caveator in an application by the caveatee under s. 327 of the National Land Code is settled in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 1 LNS 18. If an applicant is the registered proprietor of the land he need only show that he is the registered proprietor. His registered title is *prima facie* evidence of his unfettered right to deal with the land as he pleases. It is then for the caveator to satisfy the Court that there are sufficient grounds in fact and in law for the caveat to be extended. The caveator must satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and having done so he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the main action.
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> This approach to an application under s. 327(1) of the National Land Code makes an analogy between the effect of the caveat and that of an interlocutory injunction in an action for specific performance of contractual sale of land. The Court's power to grant an interlocutory injunction in such an action is discretionary. Similarly under s. 327 of the National Land Code the Court's power is discretionary.

To put it more simply, the caveator in this case must first satisfy the Court that he has a "caveatable interest" in the land. Only if he has such an interest can he qualify to lodge a caveat under s. 323 of the National Land Code. In the application to have the caveat removed the onus is cast upon the caveator to satisfy the Court that on the evidence presented his claim to an interest in the land raises a serious question to be tried and after having done so he must go on to show that on the balance of convenience, the caveat should be extended until the disposal of the main action.

[8] In *Nanyang Development [1966] Sdn. Bhd v. How Swee Poh* [1969] 1 LNS 116, Suffian FJ (as he then was) stated:

I am of the opinion that it is for the caveator to satisfy the court that it is just or the caveat to remain. I say so because, first, as between the proprietor and the caveator, the proprietor is in a superior position; secondly, because the fact that the caveat has been entered on the register does not necessarily mean that the caveator's claim to restrain the propreitor's dealings with the land is necessarily valid in view of subsection (1) of Section 324.

[9] In an application for the removal of caveat such as the one before me now, I find comfort in having the decision of the Court of Appeal in *Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545 which expresses and adopts the principles stated in *Luggage Distributors (M) Sdn. Bhd v. Tan Hor Teng & Anor* [1995] 3 CLJ 520 as a reference. When facing the issue of whether or not a caveat should be maintained or for that matter be removed, the court has to embark upon an inquiry whether on the material set out, the caveator has disclosed a caveatable interest. If the court finds none, that would be the end of the matter. Secondly, if he has so established, the court must then go on to consider whether on the evidence produced to support his claim to that caveatable interest discloses a serious question to be tried. And lastly, having resolved this first two questions in the caveator's favour, then come the question whether the balance of convenience, or more appropriately, the balance of justice lies in favour of the caveat remaining on the register.

[10] I shall now turn to the first issue of whether the defendant in the instant case has shown on the evidence produced, a caveatable interest in the land. A perusal of the statutory declaration sworn by the defendant in Form 19B in support of its application for the entry of the caveat reveals that the defendant

A has entered into a joint venture agreement with the plaintiff dated 2 November 1999. The plaintiff as the owner of the said land has agreed for the defendant to develop and thereafter sell the land with the houses and/or buildings erected thereon. The defendant further states that certain deposits has been paid to the plaintiff
B in accordance with the terms of the joint venture agreement. It is trite that a caveator must be held to the grounds he alleged in his application in Form 19B when lodging his caveat. In *Perbadanan Setiausaha Kerajaan Selangor & Ors v. Metroway Sdn. Bhd & Anor & Another Appeal* [2003] 3 CLJ 339 the Court of
C Appeal stated that a joint venture agreement does not confer a caveatable interest in land. At p. 343 of the report His Lordship Gopal Sri Ram JCA penned the following:

> It is established by authority that a Joint Venture Agreement to
D develop land and to share proceeds of the development does not confer a caveatable interest even if the agreement itself expressly provides for entry of a caveat.

[11] That is precisely the case here. In the light of the above stated passage, the defendant has no case at all, and on this
E ground alone, the plaintiff's application must be allowed. For completeness sake, I have ventured further into the facts and evidence available and found that the application for the entry of the caveat was made on 24 October 2002 which was almost four months after the notice of termination of the said joint venture
F agreement. The notice of termination was dated 26 June 2002. This was sent to the defendant after repeated reminders were issued by the plaintiff regarding the defendant's default of various articles in the said joint venture agreement which the defendant is relying on in Form 19B. From the affidavit in reply filed by the
G defendant, it is clear that the defendant openly admits that it has failed to obtain the necessary financing timeously as stipulated in the joint venture agreement and that extension of time was given by the plaintiff. The defendant has also failed to settle the redemption sum stipulated in art. 8 of the agreement and was also
H in default of art. 12 of the same in failing to pay to the relevant authorities the quit rents, premiums and other charges in connection with the upgrading of low cost houses to medium cost houses. It is further noted that the defendant admits that it has only managed to settle part of the special advances payable under
I article 4 to the plaintiff which in my view is a further admission of default by the defendant. Subsequent conduct of the defendant in response to the notice of termination of the joint venture

agreement further amplifies the fact that there was in fact a termination of the said agreement. Exhibits 'CSY 20' and 'CSY 26' in Lampiran 9 (the plaintiff's affidavit) and exh. 'KKS 7' in Lampiran 5 (the defendant's affidavit in reply) are indicative of this fact. These exhibits show proof of the two parties discussing about the three alternatives to resolve the dispute between them namely, by amicable settlement reference to arbitration and full dispute. The defendant agreed for an amicable settlement and exh. 'CSY 26' in Lampiran 9 is an indication of the defendant's willingness for a fresh joint venture agreement to be redrawn. With the termination of the joint venture agreement there is therefore nothing at all on which the defendant could possibly claim to have any interest in the land, let alone caveatable interest. Thus the defendant's application for the entry of the caveat after the termination of the joint venture agreement is certainly unmeritorious and is misconceived.

[12] It is also interesting to note the stance taken by the defendant in this case, which if I may be permitted to say, to be blowing hot and cold. While on the one hand contending that their interest in the land arises from the joint venture agreement, the submissions of the learned counsel for defendant goes squarely against it. From the defendant's affidavit in reply in Lampiran 5 and 12 it is abundantly clear that the defendant is making a frontal attack on the legality of joint venture agreement itself. The defendant contends that the plaintiff lacks the capacity to enter into the said joint venture agreement because there is an earlier joint venture agreement between the plaintiff and a third party known as Syarikat Sri Manja Sdn. Bhd. Learned counsel submits that there was misrepresentation on the part of the plaintiff. The pending suit between the plaintiff and Syarikat Sri Manja Sdn. Bhd was also raised as an issue affecting the plaintiff's capacity to enter into the joint venture agreement. Unfortunately, I do not see the relevance of this suit between the plaintiff and Syarikat Sri Manja Sdn. Bhd as affecting the plaintiff's capacity to enter into the joint venture agreement with the defendant. Be that as it may, even if I were to accept this argument, it merely goes to show that there was not in existence a valid joint venture agreement between the plaintiff and the defendant. Surely this will be disastrous to the defendant's case because as conceded by the learned counsel, the defendant has no caveatable interest in the land other than the right given by article 9 of the joint venture agreement. The said article 9 entitles the defendant to lodge a private caveat against

A the said land upon the execution of the joint venture agreement. In my humble view, the said provision cannot give rise to an interest in land as envisaged by the provisions of the National Land Code for an entry of a caveat. In this respect with humility, I once again refer to what Hashim Yeop A. Sani FJ (later CJ B Malaya) stated in *Wong Kuan Tan v. Gambut Development Sdn. Bhd (supra)* which was said in a language unrivalled for its clarity. At p. 445 His Lordship stated:

> Thus it is plain that the appellant claim to have the right to lodge C the caveat but based on cl 4(a) of the deed of assignment. It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. The contractual provision does not create an interest within the meaning of s. 323 of the National Land Code. Interest which are protectable by caveat are only D interests recognized by the Code. The contractual provision does not amount to an equitable or other interest sufficient to support a caveat. Section 323(1) of the National Land Code sets out the classes of persons who may lodge private caveat. They are person or body claiming title to any alienated land; or claiming any registrable interest in any alienated land; or claiming any right to E such title or interest; and includes person or body claiming to be beneficially entitled under any trust affecting any such land or interest. The words 'any right to such title or interest' may be wide enough to allow rights arising under a contract for registrable dealing to be protected by a caveat but they are not F wide enough to cover mere personal rights as distinguished from rights relating to land. See also David Wong, *Land Tenure in the Malay States* at pp. 416-435.

[13] Having found that the defendant has no caveatable interest, G it really serves no purpose for me to embark further onto the next stage of the process as laid down in *Murugappa Chettiar*'s case *(supra)* and *Luggage Distributors (M) Sdn. Bhd case (supra)*. However, in passing, I wish to add that the defendant has failed to disclose any serious question to be tried and in any event, the H defendant has no trial of any action pending apart from wanting the caveat to remain to the said land because of article 9 of the joint venture agreement. To date the defendant has not filed any action whatsoever against the plaintiff in respect of the dispute between them. This failure on the part of the defendant strongly I weighs against their plea for the continuance of the caveat to remain on the plaintiff's land (see: *Toko Palayakat Jamal (M) Sdn.*

Bhd v. Soon Seng Company Sdn. Bhd [2004] 3 CLJ 32, *Paya Terubong Estates Sdn. Bhd v. Pusaka Warisan Sdn. Bhd* [1998] 2 CLJ 909). The issue of maintaining *status quo* and balance of convenience therefore do not arise in the circumstances.

[14] For the aforesaid reasons, the plaintiff's application for the removal of the caveat is hereby granted in terms of the Saman Pemula in Lampiran 1.

[15] The pencelah who is the chargee in respect of 251 pieces of the subject land, certainly has an interest in the subject matter and the proceedings herein. The pencelah has also commenced proceedings in another action in the High Court for an order for sale on those charged lands. The existence of the caveat hampers their efforts in the recovery of the amount owed to them. The pencelah's support for the plaintiff's application in urging this court to remove the caveat is understandable and appropriately made.

[16] It is a matter of some regret that I am impelled to conclude this judgment by ventilating a complaint on the manner in which counsel filed their affidavits in court. From what I observed in the instant case, both the further affidavits filed by the parties are extremely lengthy and repetitive. The plaintiff's further affidavit runs up to no less than fifty paragraphs and the defendant's further affidavit has fourty three paragraphs. What concerns me more is the fact that these further affidavits are nothing more than a repetition of what has been averred to either in the earlier affidavit or in some other parts of the same affidavit. Is it a case of being over emphatic? I deemed this to be unnecessary and certainly much judicial time could be saved if judges are spared of reading these lengthy and voluminous affidavits. It makes matters worse when it finally turns out that nothing much of these lengthy averments are relied on or referred to by counsel during their submissions before me. Every document/enclosure filed in support of any application be it an affidavit in support, an affidavit in reply or a further affidavit will have to be scrutinized by the judge. This is time consuming and entails an exhausting task. Over elaboration, repetition and attempts to make every point conceivable and inconceivable without judgment or discrimination by counsel cause difficulties to judges. It is my fervent hope that practitioners should detract from this practice which I see can in certain ways assist the already overburdened judges in expediting justice.